UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

IN RE	)	
SEACHANGE INTERNATIONAL, INC.	)	CIVIL ACTION NO.
SECURITIES LITIGATION	)	02-12116-DPW
	)	

MEMORANDUM AND ORDER
February 6, 2004

Plaintiff shareholders of SeaChange International, Inc. ("SeaChange") bring this putative class action against SeaChange, two members of its management team, three of its directors, and the three lead underwriters of its January 28, 2002 secondary stock Offering (the "Offering"). The shareholders allege that the registration statement and prospectus SeaChange filed with the Securities and Exchange Commission ("SEC") in conjunction with the Offering contained material misrepresentations and omissions in violation of §§ 11, 12(a)(2), and 15 of the Securities Act of 1933 ("Securities Act"). Defendants now move through two separate motions--one by SeaChange, the management team defendants, and the director defendants; the other by the underwriters--to dismiss the case pursuant to Fed. R. Civ. P 12(b)(6) for failure to state a claim.

I. BACKGROUND

A. Facts

SeaChange is a Delaware-incorporated company with its principal executive offices in Maynard, Massachusetts. SeaChange is a leading developer, manufacturer, and marketer of video

storage systems, which automate the management and distribution of video streams, such as feature-length movies and advertisements. Consolidated and Amended Class Action Complaint ("Complaint") at ¶ 29. SeaChange markets its systems to cable television operators and broadcasters as a means to offer video-on-demand ("VOD") movies and programming, which allow viewers to watch content at any time with remote pause, rewind, and fast-forward features. Id. SeaChange's ITV System, for example, digitally manages, stores, and distributes digital video, allowing cable operators and telecommunications companies to offer VOD and other interactive television services, including retrieval of internet content through the television. Ex. 1 ("Prospectus"), at 3. Additionally, SeaChange's SPOT System allows cable operators and broadcasters to insert targeted digital advertisements into cable programming, Complaint at ¶ 29, and its MediaCluster System, a grouping of several individual servers, allows broadcasters to directly transmit video content to viewers without the need for tape libraries and other storage and playback systems. Prospectus at 30, 35.

On January 9, 2002, SeaChange filed a final Form S-3 Registration Statement ("Registration Statement"), which included the Prospectus, with the SEC; and on January 29, 2002, SeaChange conducted the Offering. Complaint at ¶ 37. In the Offering, SeaChange and seven stockholders (including defendants William Styslinger, William Fiedler, and Martin Hoffman) sold 3,594,411 shares of its common stock at a price of $28.99 per share. Id. ¶

38. The underwriters of the Offering[1] exercised an over-allotment option and purchased an additional 539,162 common shares from SeaChange. Id. The Offering netted total proceeds of $108,630,307 for SeaChange and $5,768,280 for the seven selling shareholders. Id.

On March 5, 2002, SeaChange issued a news release, announcing its financial results for the fourth quarter, which ended on January 31, 2002, two days after the Offering. Id. ¶ 39. Although results for the quarter exceeded its prior projections, as evidenced by the company's 10-K form, SeaChange reported VOD segment sales of $10.3 versus analyst estimates of $12 million. In addition, on March 5 it became public that AOL Time Warner's cable unit had awarded the contract to provide VOD services in Manhattan to nCUBE, one of SeaChange's competitors. Id. SeaChange's shares fell that day 17%, from $22.26 to $18.49, with a volume of 8.26 million shares traded, more than ten times the three-month daily average. Id.

On May 28, 2002, nCUBE announced that a jury in the federal district court in the District of Delaware had returned a jury verdict against SeaChange in favor of nCUBE.[2] Id. ¶ 47. The jury found that SeaChange had willfully infringed on nCUBE's

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[1]There were in total ten underwriters. The three that purchased the most shares are defendants in this case. Prospectus at 43.

[2]nCUBE had filed the action, nCUBE Corp. v. SeaChange, Int'l, Inc., No. 01-CV-11, on January 8, 2001. Complaint at ¶ 32.

patented VOD software and awarded nCUBE $2 million in damages and a 7% royalty on systems going back to February 1, 2002. Id. In daytime trading on May 28, 2002, SeaChange shares fell 15% to $10.39, and in after-hours trading, the shares fell to $9.09. Id. ¶ 48.

On June 5, 2002, SeaChange reported a net loss of $21 million ($0.82 per share) for the first fiscal quarter of the year. Id. The losses included $14.4 million in one-time charges and adjustments related to the nCUBE litigation. Id.

B. Procedural History

On October 20, 2002, Leon and Rena Beylus filed a class action complaint against SeaChange, two members of its management team, three of its directors, and the three lead underwriters of the Offering. Shortly following the filing of the Beylus complaint, three additional sets of plaintiffs filed related complaints. Three of the plaintiffs in the cases made competing motions to consolidate the actions and for appointment as lead plaintiff. Subsequently, all sets of plaintiffs agreed by stipulation that the four actions would be consolidated in this action and that James A. Radley would serve as lead plaintiff. Additionally, they agreed under the stipulation that Bernstein Leibhard & Lifshitz, LLP would serve as lead plaintiffs counsel and Shapiro Haber & Urmy, LLP would serve as liaison counsel.

C. Parties

Lead plaintiff James Radley purchased common stock pursuant to or traceable to the allegedly false statements in the

Registration Statement and the Prospectus. Complaint at ¶ 7. Radley represents a putative class of those who similarly bought stock in the Offering.

In addition to SeaChange, plaintiffs bring this action against: William Styslinger, who is SeaChange's chairman, president, and chief operating officer; William Fielder, who is SeaChange's chief financial officer; Martin Hoffman, Thomas Olson, and Carmine Vona, who are SeaChange directors; and Morgan Stanley & Co., Inc., Thomas Weisel Partners LLC, and RBC Dain Rauscher, Inc., the three lead underwriters for the Offering. Id. ¶¶ 9-17. For the remainder of this discussion, I refer to SeaChange and the individual defendants (Styslinger, Fielder, Hoffman, Olson, and Vona)[3] collectively as "SeaChange defendants," and I refer to the three underwriter defendants as the "Underwriters."

D. Allegations

Plaintiffs allege that SeaChange defendants and the Underwriters made material misrepresentations or omissions in the Prospectus pertaining to five general circumstances. Specifically, plaintiffs allege that the Prospectus omitted information or contained misleading statements concerning the fact that SeaChange: (1) was willfully infringing an nCUBE VOD patent, (2) was operating at a competitive disadvantage because

[3]Plaintiffs allege that each of the individual defendants signed--personally or by attorney-in-fact--the Registration Statement. Complaint at ¶ 19.

it could not provide the VOD capacity to compete in the largest metropolitan areas, (3) was at a competitive disadvantage because its SPOT system was analog and did not provide the digital applications that rival systems did, (4) had already been informed by AOL Time Warner that it would not be awarded the contract for Manhattan, and (5) had no reasonable expectation of achieving financial results in line with the consistent earnings projections they had been making for the five months prior to the Offering. Complaint at ¶ 2.

II. STANDARD OF REVIEW

A. Rule 12(b)(6)

In considering a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6), a court must take well-pled factual allegations in the complaint as true and must make all reasonable inferences in favor of the plaintiff. Watterson v. Page, 987 F.2d 1, 3 (1st Cir. 1993). The court, however, need not credit "bald assertions, unsupportable conclusions, and 'opprobrious epithets.'" Chongris v. Bd. of Appeals, 811 F.2d 36, 37 (1st Cir. 1987) (quoting Snowden v. Hughes, 321 U.S. 1, 10 (1944)), cert. denied, 483 U.S. 1021 (1987). Dismissal under Rule 12(b)(6) is only appropriate if the complaint, so viewed, presents no set of facts justifying recovery. Cooperman v. Individual, Inc., 171 F.3d 43, 46 (1st Cir. 1999).

In a securities action, a court, in deciding a motion to dismiss, may properly consider the "relevant entirety of a document integral to or explicitly relied upon in the complaint."

Shaw v. Digital Equip. Corp., 82 F.3d 1194, 1220 (1st Cir. 1996). Even if such documents are not attached to the complaint, the defendant may attach them to a motion to dismiss--and a court may consider them--without turning the motion into one for summary judgment. Id.; Romani v. Shearson Lehman Hutton, 929 F.2d 875, 879 n.3 (1st Cir. 1991). This prevents a plaintiff from "excising an isolated statement from a document and importing it into the complaint, even though the surrounding context imparts a plainly non-fraudulent meaning to the allegedly wrongful statement." Shaw, 82 F.3d at 1220.

B. Heightened Pleading Requirement

In 1995, Congress enacted the Private Securities Litigation Reform Act ("PSLRA") to curb abuse in private securities litigation. Greebel v. FTP Software, Inc., 194 F.3d 185, 191 (1st Cir. 1999). The PSLRA states, in part:

> In any private action arising under this chapter in which the plaintiff alleges that the defendant--
>
> (A) made an untrue statement of a material fact; or
>
> (B) omitted to state a material fact necessary in order to make the statements made, in the light of the circumstances in which they were made, not misleading;
>
> the complaint shall specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.

15 U.S.C. § 78u-4(b)(1).

Prior to the enactment of the PSLRA, a plaintiff who alleged

a knowing or intentional falsehood was required to meet the requirements of Fed. R. Civ. P. 9(b) by stating the circumstances constituting the falsehood "with particularity."[4] On the other hand, if the complaint did not "sound in fraud"--if, in other words, the plaintiff alleged negligent or innocent misrepresentation--no heightened pleading requirement applied. See Shaw, 82 F.3d at 1223.

Section 78u-4(b)(1) does away with the need to determine whether a complaint "sounds in fraud" and imposes a heightened pleading requirement on all § 11 and § 12(a)(2) claims arising out of alleged misrepresentations or omissions. The PSLRA's pleading standard is "congruent and consistent with the pre-existing standards" of the First Circuit for Rule 9(b), which are "notably strict and rigorous." Greebel, 194 F.3d at 193. Thus, under the PSLRA, as previously under Rule 9(b), a plaintiff must specify each allegedly misleading statement or omission, and additionally, "the plaintiff must not only allege the time, place, and content of the alleged misrepresentations with specificity, but also the 'factual allegations that would support a reasonable inference that adverse circumstances existed at the time of the offering, and were known and deliberately or recklessly disregarded by defendants.'"[5] Id. at 193-94 (quoting

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[4]Rule 9(b) states in full: "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity."

[5]Although the pleading requirements under the PSLRA are strict, they do not alter the underlying Rule 12(b)(6) standard

Romani, 929 F.2d at 878).

III. DISCUSSION

A. Sections 11 and 12

(1) Liability

Section 11 of the Securities Act provides that if any part of a company's registration statement for an offering "contained an untrue statement of a material fact or omitted to state a material fact required to be stated therein or necessary to make the statements therein not misleading," a purchasing shareholder has a cause of action against, inter alia, the company, its directors and mangers, and the offering underwriters.[6] 15 U.S.C. § 77k(a).

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of review. Thus, even under the PSLRA, a court must draw all reasonable inferences from the particular allegations in the plaintiff's favor. Aldridge v. A.T. Cross Corp., 284 F.3d 72, 78 (1st Cir. 2002).

[6]Section 11 states that

> any person acquiring such security (unless it is proved that at the time of such acquisition he knew of such untruth or omission) may, either at law or in equity, in any court of competent jurisdiction, sue--
>
> (1) every person who signed the registration statement;
>
> (2) every person who was a director of . . . the issuer at the time of the filing of the part of the registration statement with respect to which his liability is asserted;
>
> . . .
>
> (5) every underwriter with respect to such security.

15 U.S.C. § 77k.

Similarly, liability to a purchasing shareholder attaches under § 12(a)(2) for

> offer[ing] or sell[ing] a security . . . by means of a prospectus or oral communication, which includes an untrue statement of a material fact or omits to state a material fact necessary in order to make the statements, in the light of the circumstances under which they were made, not misleading (the purchaser not knowing of such untruth or omission).

15 U.S.C. § 77l.

For present purposes, there are two key differences between § 11 and § 12. First, while only statutory "sellers" can be liable under § 12, § 11 has no such requirement. Second, liability under § 12, unlike under § 11, must be tied to affirmative statements in registration statement. Liability may be imposed under § 12 either because a statement is itself false or because an omission of material fact makes the statement misleading. Section 11, on the other hand, imposes liability not only where a registration statement contained an untrue material statement or omitted a material fact necessary to make statements therein not misleading, but also where it "omitted to state a material fact required to be stated therein." See Shaw, 82 F.3d at 1205. Thus, § 11, unlike § 12, grounds liability on freestanding omissions of material fact to the degree required to be made in the registration statement.

Finally, scienter is not an element under either § 11 or under § 12. See In re Donald J. Trump Casino Secs. Litig.-Taj Mahal Litig., 7 F.3d 357, 368 n.10 (3d Cir. 1993) (comparing the requirements under § 10 of the 1934 Securities Exchange Act with

the requirements under § 11 and § 12), cert. denied sub nom., Gollomp v. Trump, 510 U.S. 1178 (1994); see also Shaw, 82 F.3d at 1223 (no scienter requirement under § 11).

B. Statutory Sellers

As an initial matter, the SeaChange defendants contend that plaintiffs have failed sufficiently to allege that any of the SeaChange defendants were statutory "sellers" under § 12(a)(2).[7] Under § 12(a)(2), only one who "offers or sells" a security is liable for violations of the section's substantive provisions. The plaintiffs did not argue in opposition to the motion to dismiss that a § 12 action could be maintained against the SeaChange defendants. At the hearing on the motion to dismiss, plaintiffs confirmed that they were abandoning the § 12 claim as to the SeaChange defendants.

C. Misleading Material Statements

While in their complaint, plaintiffs tend to mix together allegations of material misrepresentations and allegations of material omissions, they identify a number of affirmative statements in the Prospectus that they contend either were false or, due to omissions of material facts, misleading. Plaintiffs point out five categories of such statements: statements concerning (1) demand for SeaChange products, (2) SeaChange's competitive position, (3) sources of revenue, (4) revenue growth, and (5) proprietary information and the nCUBE litigation. I find

[7]Underwriters do not argue that they were not statutory "sellers" for the purposes of 12(a)(2) liability.

these allegations fail to state a claim under § 11 or § 12. First, statements in the first four categories were "forward-looking" within the meaning of the safe harbor provisions of the PSLRA and therefore cannot ground § 11 or § 12 liability. Second, the statements regarding proprietary information and the nCUBE litigation provided such disclosure of material information as was required.

(1) Forward-Looking Statements

The "Safe Harbor" provisions of § 102(b) of the PSLRA state, in part, that:

> in any private action arising under this chapter that is based on an untrue statement of a material fact or omission of a material fact necessary to make the statement not misleading, a person . . . shall not be liable with respect to any forward-looking statement, whether written or oral, if and to the extent that--
>
> (A) the forward-looking statement is--
>
> (i) identified as a forward-looking statement, and is accompanied by meaningful cautionary statements identifying important factors that could cause actual results to differ materially from those in the forward-looking statement; or
>
> (ii) immaterial.

15 U.S.C. § 78u-5(c)(1). Under § 102(b), "forward-looking" statements include:

> (A) a statement containing a projection of revenues, income (including income loss), earnings (including earnings loss) per share, capital expenditures, dividends, capital structure, or other financial items;
>
> (B) a statement of the plans and objectives of management for future operations, including plans or objectives relating to the products or services

of the issuer;

(C) a statement of future economic performance, including any such statement contained in a discussion and analysis of financial condition by the management or in the results of operations included pursuant to the rules and regulations of the Commission.

(D) any statement of the assumptions underlying or relating to any statement described in subparagraph (A), (B), or (C).

Id.

Plaintiffs identify a number of statements in the Prospectus that they claim were materially misleading because the statements did not include facts known by SeaChange at the time of the Offering. For example, with regard to demand for SeaChange products, the Prospectus stated:

> If there were a decline in demand or average selling prices for our broadband products, including our ITV System and SPOT system, our revenues would be materially affected.
>
> We expect our broadband products to continue to account for a significant portion of our revenues. Accordingly, a decline in demand or average selling prices for our broadband products, whether as a result of new product introductions by others, price competition, technological change, inability to enhance the products in a timely fashion, or otherwise, would have a material adverse effect on our business, financial condition and results of operations.

Prospectus at 7.

Plaintiffs contend that these statements were materially false and misleading because "at the time they were made, the Company was then experiencing a decline in demand, profit margin and average selling prices for its broadband products." Complaint at ¶ 54.

The statements plaintiffs identify are clearly forward-looking in nature and therefore fall squarely within the safe harbor provisions of the PSLRA. The same is true of the statements concerning competitive position, sources of revenue, revenue growth that plaintiffs allege to be materially misleading.[8] Thus, none of the statements can be the source of § 11 or § 12 liability.

All the statements identified by plaintiffs appear in a section of the Prospectus entitled "Risk Factors." The statements generally fall within the subject matter contemplated by § 102(b)'s definition of "forward-looking" as they concerned SeaChange's plans and expectations regarding revenues, products and services, and economic performance. Moreover, the statements all are couched in conditional terms or phased in the future tense. For example, the excerpt of the Prospectus above concerning demand for products stated that "*If* there were a decline" and "We *expect*" and "a decline in demand or average selling prices . . . *would have* a material adverse effect." (Emphasis added). The same type of "forward-looking" language appears in the other statements identified by plaintiffs. While material misrepresentations of present fact are actionable under § 11 and § 12, even where they are encompassed within "forward-

[8]Excerpts from the Prospectus relating to these topics are in paragraphs 56, 58, and 60 of the Complaint. Because the excerpts are lengthy and, more importantly, because my rulings are based on their general nature as "forward-looking" rather than on the specifics of their content, I do not reproduce them here.

looking" statements, see Shaw, 82 F.3d at 1213, plaintiffs fail to point to any "present-oriented aspect" of the statements they allege were materially misleading.

Additionally, the statements plaintiffs identify included and were accompanied by sufficient cautionary language to put them within the bounds of the safe harbor provisions. Indeed, the section of the Prospectus in which the statements appeared was entitled "Risk Factors." The section began with the following:

> You should carefully consider the following risks before investing in our common stock. If any of the following risks come to fruition, our business, results of operations or financial condition could be materially adversely affected. In that case, the trading price of our common stock could decline, and you may lose all or part of your investment.

Prospectus at 6. Many of the statements plaintiffs identify as misleading themselves warned investors of potential risks and factors that could adversely affect SeaChange. In a section under the heading "Special Note Regarding Forward-Looking Statements" which immediately followed the "Risk Factors" section, the Prospectus stated:

> We have made statements under the captions "Prospectus Summary," "Risk Factors," "Management Discussion and Analysis of Financial Condition and Results of Operations," "Business" and in other sections of this prospectus that are forward-looking statements. In some cases, you can identify these statements by forward-looking words such as "may," "might," "will," "should," "expects," "plans," "anticipates," "believes," "estimates," "intends," "predicts," "future," "potential," or "continue," the negative of these terms and other comparable terminology. . . . These statements are only predictions based on our current expectations and projections about future

> events. Because these forward-looking statements involve risks and uncertainties, there are important factors that could cause our actual results, level of activity, performance or achievements to differ materially from the results, level of activity, performance, or achievements expressed or implied by the forward-looking statements, including those factors discussed under the caption entitled "Risk Factors." You should specifically consider the numerous risks outlined under "Risk Factors."
>
> Although we believe the expectations reflected in the forward-looking statements are reasonable, we cannot guarantee future results, levels of activity, performance or achievements. Except as otherwise required by law, we are under no duty to update any of these forward-looking statements after the date of this prospectus to conform our prior statements to actual results or revised expectations.

Prospectus, at 13.

Given the abundance of cautionary language and the forward-looking tone of the "Risk Factors" section, I find that the statements plaintiffs identify within the section--regarding demand for products, competitive position, and revenue growth--were not materially misleading because they are protected under the safe harbor provisions of the PSLRA.

(2) Proprietary Information and nCUBE Litigation - In addition to the statements from the "Risk Factors" section, plaintiffs allege that a number of statements in the Prospectus regarding SeaChange's proprietary information were materially misleading. Specifically, plaintiffs allege in the complaint that references to

> "our ITV System," "our video systems," and our "MediaCluster System" . . . were materially false and misleading because Defendants represented that SeaChange had full proprietary rights to the Mediaserver technology when, in fact, at the time the

> statements were made, SeaChange did not have proprietary rights to the technology and was willfully infringing upon nCUBE's patent on this technology.

Complaint at ¶ 50.

Plaintiffs similarly allege that the following statements, from a section of the Prospectus entitled "Legal Proceedings," were materially false and misleading as to the nCUBE litigation:

> We responded on January 26, 2001, denying the claim of infringement. . . .
>
> We cannot be certain of the outcome of the foregoing litigation, but do plan to oppose the allegations against us and assert our claims against the other parties vigorously. [W]e are unable to estimate the impact to our business, financial condition and results of operations or cash flows.

Id. ¶ 52.

Plaintiffs contend the statements were false and misleading because SeaChange was, at the time it made the statements, willfully infringing on nCUBE's patent. Thus, plaintiffs argue that SeaChange knew with a "high degree of certainty" that nCUBE would receive a jury verdict in its favor, which would adversely impact SeaChange's business. Id.

The only factual allegation plaintiffs offer to support their contention that SeaChange knew the statements to be false or misleading is the jury verdict, subsequent to the Offering, which found that SeaChange had willfully infringed nCUBE's VOD system patent. I observe, as well, from the nCUBE litigation docket that the trial judge found the case to have been exceptional under 35 U.S.C. § 258 and awarded attorneys fees to nCUBE. Such a finding is generally reserved for cases involving

willful infringement and the conduct of litigation asserting bad faith claims and defenses. See generally Multiform Desiccants, Inc. v. Medzam, Ltd., 133 F.3d 1473 (Fed. Cir. 1998).

To be sure, willfulness in the context of patent infringement is not equivalent to actual knowledge. State Indus., Inc. v. Mor-Flo Indus., Inc., 883 F.2d 1573, 1581 (Fed. Cir. 1989), aff'd after remand, 948 F.2d 1573 (Fed. Cir. 1991) ("[a]ctual knowledge is not required" for a finding of willful infringement); see Vulcan Eng'g Co. v. Fata Aluminum, Inc., 278 F.3d 1366, 1378 (Fed. Cir. 2002), cert. denied, 537 U.S. 814 (2002). But it may be inferred, from the jury verdict of willful infringement and the judge's grant of attorneys fees against SeaChange, that SeaChange knew it was infringing nCUBE's patent when generating the Prospectus and Registration Statement. This permissible inference is sufficient at the pleading stage to establish knowledge by SeaChange at the time of the registration statement that a loss in the nCUBE litigation was highly likely.

Given the permissible inference that SeaChange knew that it was infringing on nCUBE's patent--or, in the words of plaintiffs, that it "knew the suit [against it] was meritorious"--I turn to the question whether the statements made as part of the registration statement were affirmatively misleading.

It cannot seriously be disputed that the statements in the Prospectus concerning the nCUBE litigation were literally true; the statements merely described the litigation in very broad terms. Plaintiffs, however, cite Roeder v. Alpha Industries,

Inc., 814 F.2d 22, 26 (1st Cir. 1987), for the proposition that "[w]hen a corporation does make a disclosure--whether it be voluntary or required--there is a duty to make it complete and accurate." Accordingly, they argue that while SeaChange's statements about the nCUBE litigation might have been literally true, they were nevertheless incomplete and misleading because they did not disclose the patent infringing conduct.

The disclosure duty referred to in Roeder, however, is not so diffuse as plaintiffs suggest. While a company that chooses to reveal material information, even though it had no duty to do so, "must disclose the whole truth," id., it need not disclose everything it knows; rather, the company is required only to make additional disclosures to keep the information from being materially misleading. As the First Circuit stated in Backman v. Polaroid Corp., 910 F.2d 10 (1st Cir. 1990):

> Plaintiffs quote Roeder that even a voluntary disclosure of information that a reasonable investor would consider material must be "complete and accurate." This, however, does not mean that by revealing one fact about a product, one must reveal all others that, too, would be interesting, market-wise, but means only such others, if any, that are needed so that what was revealed would not be "so incomplete as to mislead."

Id. at 16.

Here, the Prospectus mentions the nCUBE litigation in general descriptive terms, as required by Item 103 of Regulation S-K, discussed infra section III.D.1. The Prospectus stated that SeaChange was contesting nCUBE's claim of patent infringement,

that it was not certain what the outcome of the litigation would be, and that it could not "estimate the impact" of the litigation. It contained no statements suggesting that SeaChange would prevail in the litigation or implying that the impact of the litigation on the company would be positive.[9] Given that at the time of the Offering the jury had not yet returned a verdict,[10] SeaChange was not obligated to predict the outcome or estimate the impact of the nCUBE litigation.[11] See Weilgos v. Commonwealth Edison Co., 892 F.2d 509, 517-18 (7th Cir. 1989).

The information provided in the Prospectus was accurate,

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[9]Such statements would have been much firmer grounds for § 11 or § 12 liability. See Burnstein v. Applied Extrusion Tech., Inc., 150 F.R.D. 433 (D. Mass. 1993) (affirmative statement that management did not believe pending lawsuit would have a material, adverse effect on the operation of the company was actionable).

[10]According to the Prospectus, discovery was completed around December 2001 with a claim construction hearing to follow the conclusion of discovery.

[11]Plaintiffs cite two cases, In re TCW/DW North American Government Income Trust Securities Litigation, No. 95 Civ. 0167 (PKL),1997 WL 727487 (S.D.N.Y. Nov. 20, 1997), and In re Prudential Securities, Inc. Ltd. Partnerships Litigation, 930 F. Supp. 68 (S.D.N.Y. 1996), which held that risk disclosures were not sufficient and therefore were misleading. Those cases are inapposite because in both cases, unlike in this case which involves predictions about the vagaries of litigation, the defendants had actual knowledge of information which they failed to disclose thereby rendering prospectus statements misleading. In In re TCW/DW, the court found that plaintiffs sufficiently stated a claim where defendants allegedly failed to adequately disclose the consequences of a "maturity extension risk" for securities in defendants' portfolio, which defendants knew could substantially affect the volatility of the securities. 1997 WL 727487, at 5*. In In re Prudential, the court held that warnings in prospectuses that the residual value of defendant's aircraft could decline were not adequate where plaintiffs cited evidence that defendant had been warned by experts that residual values of its aircraft would decline radically. 930 F. Supp. at 72.

even considering knowledge of the patent infringing conduct. While the information may have been, in some predictive sense, incomplete, I find that, given the well understood vagaries of litigation, it was not so incomplete as to mislead investors.

D. Omissions of Material Fact Required to be Stated

In addition to alleging that affirmative statements in the Prospectus were materially misleading, plaintiffs also contend that defendants violated § 11 by failing to disclose in the Prospectus or Registration Statement material facts known by SeaChange at the time of the Offering. In their amended complaint plaintiffs confusingly conflate allegations of omissions related to affirmative statements in the Prospectus with allegations of free-standing omissions unrelated to specific statements. However, in their summary judgment opposition, plaintiffs clarify that their allegations encompass the latter type of omission.[12] In other words, plaintiffs contend that even if none of the affirmative statements in the Prospectus are actionable as misleading under § 11 or § 12, SeaChange nevertheless had a duty under § 11 to disclose information it possessed at the time of the Offering about (1) the nCUBE litigation, (2) the AOL Time Warner Manhattan contract, and (3)

[12]The Underwriters describe plaintiffs approach as "march[ing] a subtle retreat from the original premise of [their] claims" and contend plaintiffs "now abandon[] any suggestion that the Prospectus contained affirmative misstatements on those topics." Fairly read, however, the complaint sets forth--albeit not distinctly-- allegations of both general omissions and omissions relating to specific statements in the Prospectus.

intra-quarter performance.

To avoid dismissal of a claim based on a free-standing omission of material fact--one not tied to a specific statement in the Prospectus--plaintiffs must sufficiently allege: (1) that the Prospectus contained an omission; (2) that the omission was material; (3) that defendants were under a duty to disclose the omitted information; and (4) that such omitted information existed at the time the Prospectus became effective. Cooperman, 171 F.3d at 47. Considering in turn whether plaintiffs allegations of omissions satisfy these elements, I find that plaintiffs have failed to state a claim because they have not alleged facts which implicate any duty on the part of SeaChange to disclose the information plaintiffs contend was unlawfully omitted from the Prospectus. Even if omitted information is material, there can be no liability for the omission under the securities laws unless there is a duty to disclose the information. In other words, "[s]ilence, absent a duty to disclose, is not misleading." Polaroid, 910 F.2d 10.[13] Here, plaintiffs have failed to identify any such duty as to any of the allegedly omitted information.

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[13]In Polaroid, the First Circuit discussed in depth the plaintiffs' (and the trial court's) initial failure to appreciate Roeder's clear mandate that a duty of disclosure must undergird an alleged material omission for the omission to constitute securities fraud. Polaroid, 910 F.2d at 12-15. The decision, however, centrally concerned the claims which plaintiffs had reformulated as misleading misrepresentations on rehearing (see supra section III.C.2).

(1) nCUBE Litigation –

Plaintiffs suggest that even if none of the statements in the Prospectus describing the nCUBE litigation were materially false or misleading, SeaChange nevertheless had, under § 11, the obligation to disclose the fact that it was likely to lose the litigation because SeaChange knew at the time of the Offering that it was infringing on nCUBE's patent. This allegation is closely-aligned with the allegation found deficient above, see supra section III.C.2, but it is distinct in that it is not tied to any affirmative statements in the Prospectus.

Plaintiffs point to no duty--other than a generalized duty of disclosure, which as discussed, infra, is not sufficient--that would require SeaChange to describe the nCUBE litigation differently or in more detail than it did in the Prospectus. The defendants fully complied with the disclosure duty imposed by Item 103 of Regulation S-K which requires registrants to:

> [d]escribe briefly any material pending legal proceedings, other than ordinary routine litigation incidental to the business, to which the registrant or any of its subsidiaries is a party or of which any of their property is the subject [and to include] the name of the court or agency in which the proceedings are pending, the date instituted, the principal parties thereto, a description of the factual basis alleged to underlie the proceeding and the relief sought.

17 C.F.R. § 229.103.

Item 103 marks the extent of a registrant's obligation to disclose information pertaining to pending litigation. In directing the required disclosure in Item 103 to the general

contours of ongoing litigation, the SEC has deliberately chosen not to impose the type of duty of disclosure that plaintiffs contend defendants' breached. See Roeder v. Alpha Industries, Inc., 814 F.2d 22 (1st Cir. 1987) ("The SEC [] was 'given complete discretion . . . to require in corporate reports only such information as it deems necessary or appropriate in the public interest or to protect investors.'" (quoting S. Rep. No. 792, 73d Cong., 2d Sess. 10 (1934))). The disclosure required by Item 103 is meant to put potential investors on notice of pending litigation, not to force companies to predict a particular outcome in the litigation. See Wielgos, 892 F.2d at 517-18 ("Nothing [in Item 103 is] about the status of the litigation within the tribunal, or how the tribunal is organized, or the probability that the tribunal will deliver a particular decision."). Here, the Prospectus set forth information required in Item 103 and further stated that the company could not be certain of the outcome of the litigation and that it could face "significant liability for damages and invalidation of [its] proprietary rights." Prospectus, at 10. This disclosure was certainly enough to alert investors of the nCUBE litigation and to prompt them to make further inquiry directly about the litigation should they choose to do so.

Plaintiffs' citation of Roeder, is misguided. While plaintiffs may be correct that Roeder supports the conclusion that SeaChange's patent infringing conduct was material, the

decision does not assist them in locating the source of a duty to disclose necessary to their claim. Indeed, the First Circuit in Roeder found that while the fact that the defendant company had paid a bribe to obtain a subcontract was material, plaintiff failed to state a claim for securities fraud[14] because he did not allege facts that, if proved, established the defendant had a duty to disclose the bribe.[15] Id. at 28. The Roeder court stressed that "[a] duty to disclose 'does not arise from the mere

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[14]Roeder concerned § 10(b) of the Securities Act but is applicable to the § 11 and § 12 claims here as to materiality and disclosure requirements.

[15]Plaintiffs similarly misapprehend the import of Wielgos, 892 F.2d 509. In that case, investors alleged that the defendant company violated § 11 by failing to disclose specific facts regarding a pending license application before the Nuclear Regulatory Commission, but the Seventh Circuit found no violation. Plaintiffs here cite Wielgos for the proposition that "[m]ateriality depends not only on the magnitude of an effect but also on its probability." 892 F.2d at 517. They contend that while in Wielgos the probability that the safety license application would be denied was minuscule, here the probability that SeaChange would lose the nCUBE litigation was high, given its willful infringement. Even if this is so, it only goes to the question of materiality. The Wielgos court decided the case "without regard to materiality" because the defendant "revealed all that Item 103 requires." Id. The court rejected plaintiffs' contention that the defendant had a duty to disclose more specific information than required by Item 103, including which particular part of the Nuclear Regulatory Commission would consider the application and the likelihood and impact of an adverse decision. The court stated that "[t]he securities acts do not have this ex post perspective. Their approach is ex ante." Id. at 518. The court concluded:

> [The defendant] firm lived up to the technical requirements of Item 103. No one's interests would be served by requiring the details Wielgos demands from the privileged position of hindsight, as opposed to the "brief[]" description the SEC solicited.

Id.

possession of nonpublic market information,'" and endorsed "the prevailing view . . . that there is no [] affirmative duty of disclosure" in cases where "there is no insider trading, no statute or regulation requiring disclosure, and no inaccurate, incomplete, or misleading prior disclosures." Id. at 27. Roeder applies here and requires dismissal of plaintiffs' nCUBE claims given their failure to allege facts which give rise to any affirmative duty of SeaChange to disclose its patent infringing conduct.

(2) AOL Time Warner Contract

Plaintiffs allege that at the time of the Offering SeaChange "had already been informed by AOL Time Warner that it would not be awarded AOL Time Warner's" Manhattan contract. Complaint at ¶ 2(d). As alleged, the information was omitted, it was material, and it was known at the time of the Offering.[16] Thus, the only question concerns whether SeaChange had a duty to disclose information about the contract in the Offering filings.

The parties spar over this point, broadly disagreeing about whether and to what extent SeaChange had a free-standing duty of disclosure in completing the Offering materials. In arguing that plaintiffs have failed adequately to allege a § 11 violation,

[16]The SeaChange defendants dispute this last point, arguing that even if AOL Time Warner had informed SeaChange that SeaChange would not get the Manhattan contract, SeaChange still could not have known at the time of the Offering whether AOL Time Warner would hold true to its word. I find this argument without merit. As alleged, SeaChange knew at the time of the Offering that it would not win the Manhattan contract.

defendants rely upon the "fixture" in securities law that "silence, absent a duty to disclose, cannot be actionably misleading" and its corollary proposition that "the mere possession of material nonpublic information does not create a duty to disclose it." Shaw, 82 F.3d at 1202. Plaintiffs, on the other hand, seize on language, also in Shaw, that supports a more generalized duty of disclosure. In Shaw, the First Circuit stated:

> The obligations that attend the preparation of [public stock offering] filings embody nothing if not an affirmative duty to disclose a broad range of material information. Indeed, in the context of a pubic offering, there is a strong affirmative duty of disclosure.
>
> . . .
>
> [T]he determination of whether the alleged nondisclosures in this case provide a legally sufficient basis for the plaintiffs' claims cannot be severed from consideration of the basic policies underlying the disclosure obligations of the applicable statutes and regulations.

Id. at 1203 (internal citations omitted). Shaw continues its discussion of the securities laws' duty disclosure with an analogy to insider trading, stating that:

> [j]ust as an individual insider with material nonpublic information about pending merger or license negotiations could not purchase his company's securities without making disclosure, the company itself may not engage in such a purchase of its own stock, if it is in possession of such undisclosed information. By extension, a comparable rule should apply to issuers engaged in a stock offering. Otherwise, a corporate issuer selling its own securities would be left free to exploit its informational trading advantage, at the expense of investors, by delaying disclosure of material nonpublic negative news until after completion of the offering.

Id. at 1204 (internal citations omitted).

Building on this language, plaintiffs argue that because "[it] is undisputed that no corporate insider would have been able to sell stock while in possession of that information before its public disclosure," SeaChange had a duty to disclose the information or abstain from the Offering.

The insider trader analogy, however, takes plaintiffs only so far. While the analogy underscores "the policy reasons supporting a comparably strong disclosure mechanism in the context of a public offering," Shaw, 82 F.3d at 1204, it does not obviate the need to "look to the explicit statutory and regulatory framework to determine whether the Securities Act provides such a mechanism." Id. Thus, the simple fact that an insider in possession of the alleged information about the AOL contract might not have been able to sell stock does not, by itself, create a free-standing duty on the part of SeaChange to disclose the information.

Although not alleged as such in their amended complaint, plaintiffs, in their summary judgment opposition brief, point to Item 303 of Regulation S-K and Instruction 11(a) of Form S-3 of the SEC filing materials. Pursuant to Form S-3's Instruction 11(a), SeaChange was required disclose

> any and all material changes in the registrant's affairs which have occurred since the end of the latest fiscal year for which certified financial statements were included in the latest annual report to security holders and which have not been described in a report on Form 10-Q or Form 8-K filed under the Exchange Act.

Shaw, 82 F.3d at 1205. While SeaChange was not required to

complete Form S-K but rather employed Form S-3,[17] the scope of Instruction 11(a)'s "material changes" disclosure is circumscribed largely by the scope of requirements of Item 303 of Registration S-K. Item 303 states, in part:

> (i) Describe any unusual or infrequent events or transactions or any significant economic changes that materially affected the amount of reported income from continuing operations and, in each case, indicate the extent to which income was so affected. . . .
>
> (ii) Describe any known trends or uncertainties that have had or that the registrant reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations.

17 C.F.R. § 229.303(a)(3).

Here, reference in both subparts of Item 303 to "continuing operations" implies the event, transaction, or trend at issue must have some relevance to the company as it stood at the time of the filing. Indeed, according to the SEC's 1989 release interpreting Item 303(a), "[a] disclosure duty exists where a trend, demand, commitment, event or uncertainty is both [1] presently known to management and [2] reasonably likely to have material effects on the registrant's financial condition or results of operation." Management's Discussion and Analysis of Financial Condition, Securities Act Release No. 6835 (May 18,

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[17]Form S-3 is a streamlined registration statement for certain well-capitalized, widely-followed issuers. Shaw, 82 F.3 at 1205. A registrant, like SeaChange, which is authorized to use Form S-3 makes certain disclosures by incorporating by reference its most recent Form 10-K and Forms 10-Q. Id. The "material changes" requirement in Instruction 11(a) is meant to require a company to provide information updating those incorporated forms, which is similar to the information required of an ordinary company that uses the Form S-K. See id.

1989), Fed. Sec. L. Rep. (CCH) ¶ 72,436, at 62,143, reprinted at ¶ 73,193, at 62,842; see Steckman v. Hart Brewing, Inc., 143 F.3d 1293, 1296 -97 (9th Cir. 1998). While plaintiffs have adequately pled that SeaChange knew at the time of the Offering that it had lost its bid for AOL Time Warner's Manhattan contract, the failed bid was not relevant to SeaChange's "financial condition or results of operation" at the time of the Offering.

In discussing the requirements of Item 303, the Ninth Circuit has stated:

> Required disclosure is based on currently known trends, events and uncertainties that are reasonably expected to have material effects, such as: A reduction in the registrant's product prices; erosion in the registrant's market share; changes in insurance coverage; or the likely non-renewal of a material contract. In contrast, optional forward-looking disclosure involves anticipating a future trend or event or anticipating a less predictable impact of a known event, trend or uncertainty.

Steckman, 143 F.3d at 1297. Here, SeaChange's failed bid on the AOL contract, unlike a *non-renewal* of a material contract or the *erosion* of market share, constituted a failed attempt by the company to expand its customer base and market share. At worst, the failed bid represents the beginning of a future trend that would affect future expectations of revenue and growth. The fact that, as plaintiffs allege, SeaChange stock declined 17% upon release of the news of the failed bid does not save the claims because the decline can be viewed as market anticipation of future trends.[18] Plaintiffs have not alleged that the failed AOL

[18]I note additionally that, even by plaintiffs description, the 17% stock drop was precipitated by both news of the failed

contract affected SeaChange's continuing operations--by, for example, influencing pricing, costs, market share, or revenues--as they stood at the time of the Offering. Thus, I will dismiss plaintiffs claims as they relate to SeaChange's failed AOL Time Warner contract bid.

(3) Intra-quarter Performance

Plaintiffs allege that defendants did not satisfy the duties of disclosure mandated by either Item 303 of Regulation S-K or Instruction 11(a) of Form S-3 of the Registration Statement materials by failing to disclose the following information which impacted SeaChange's intra-quarter performance and which SeaChange knew would lead to worse-than-expected fourth quarter performance:

(a) SeaChange was at a competitive disadvantage due to its inability to serve large metropolitan areas that would otherwise have been a showcase for the Company's products;

(b) SeaChange was losing its opportunity to capitalize on the rollout of VOD services to its competitors;

(c) SeaChange VOD revenues, which had been expected to rise due to increasing demand for VOD services, were flat-to declining; and

(d) The price of SeaChange's VOD equipment was declining faster than had been expected.[19]

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bid and SeaChange's fourth quarter financial results. Complaint at ¶ 39. Thus, it would be difficult--if not impossible--to infer from the stock drop alone the negative impact of failed bid.

[19]In their opposition memorandum, plaintiffs add to this list information concerning nCUBE litigation and the AOL Time Warner Contract. As discussed supra, these additions do not form the sufficient bases for claims whether with reference to

Complaint at ¶ 63.

(a) Competitive Disadvantage - While plaintiffs offer some basis to ground their claim that SeaChange knew at the time of the offering that it was at a competitive disadvantage as compared to its competitors, I find that they nevertheless have not sufficiently made out a claim. Plaintiffs offer two separate bases for their allegations concerning SeaChange's competitive disadvantage: First, they argue that statements by Styslinger, in a television interview, admitted that SeaChange was at a competitive disadvantage. Second, plaintiffs allege that according to a former SeaChange manager and supervisor, deficiencies in SeaChange's products put it at a competitive disadvantage.

In their amended complaint, plaintiffs offer the following statements by Styslinger in the CNBC interview when asked about the failed AOL Time Warner contract:

> In the case of Manhattan, Manhattan has the view that they are a very large cable operation. They're not as small as the surrounding Cablevision operation, which is a SeaChange system, you know, roughly a third of that size. But they view themselves as very large and wanted the world's largest server to deal with that and nCUBE claims they have the world's largest server.

Complaint at ¶ 40. Far from an admission that SeaChange was at a competitive disadvantage, Styslinger's statements suggest little more than that nCUBE claimed to have the world's largest server and, perhaps, that AOL Time Warner believed that claim. The

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Instruction 11(a) or otherwise.

statements do not suggest what plaintiffs must allege to state a claim: that SeaChange knew, at the time of the Offering, that it was operating at a competitive disadvantage.[20]

Neither do the alleged statements of the former SeaChange engineer provide a sufficient basis for § 11 liability. Plaintiffs allege that according to the engineer:

> SeaChange's software was less proven than that of its competitors for use with very large numbers of subscribers. SeaChange's servers could not handle as many digital streams, and had less "back office" capacity than nCUBE's. (With nCUBE's back office functions, cable companies could bill and manage subscriber information, including collecting data on what programs subscribers are watching.) One nCUBE server could service a large cable system, considered preferable to SeaChange, which could only service large systems by clustering several of it's [sic] smaller servers together. In addition, SeaChange's SPOT system of advertisement insertion was at a competitive disadvantage, as it lacked sufficient digital applications, a problem SeaChange was aware of and working to rectify.

Complaint at ¶ 57.

While these allegations marginally support plaintiffs' contention that SeaChange had certain competitive disadvantages, plaintiffs fail adequately to tie the contention to a duty to disclose under Instruction 11(a). As noted above, see supra section III.D.2, the "material changes" instruction concerns

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[20]As defendants point out, Styslinger's statement that Manhattan is not as "small as the surrounding Cablevision operation" seems to be a misstatement. Regardless, even assuming it was not, the excerpt does not suggest what plaintiffs allege it suggests.

Additionally, defendants offer the excerpt in the context of prior and subsequent exchanges in the interview. While it appears plaintiffs wrench the excerpt out of the larger context, given my finding that the excerpt is not an admission of competitive advantage, I need not address the interview as a whole.

continuing operations, and while it is clear that a significant competitive disadvantage could hinder future performance, plaintiffs have not sufficiently alleged that the competitive disadvantage hindered the ongoing operations of SeaChange. And again, as discussed in section III.D.2, supra, reference to the failed AOL Time Warner contract to make such a connection is unavailing. Accordingly, plaintiffs claims as they relate to SeaChange's alleged competitive disadvantage will be dismissed.

(b) VOD Rollout - Plaintiffs allege no basis for their conclusory contention that SeaChange had knowledge that it was losing its opportunity to capitalize on the rollout of VOD services to its competitors. Insofar as the failed AOL Time Warner contract is meant to provide the basis for the contention, it is redundant of the claims discussed in section III.D.2, supra. Accordingly, any claim that relates to the rollout of VOD services will be dismissed.[21]

(c) VOD Revenue - Plaintiffs allege that SeaChange had a duty to disclose intra-quarter information indicating that VOD segment sales would not reach expectations. SeaChange's VOD segment sales for the fourth quarter, which ended on January 31, 2002, two days after completion of the Offering, were 10.3 million compared to analysts' estimates of $12 million. Complaint at ¶ 39.

[21]Plaintiffs, moreover, do not include this category of information in their recital in their opposition brief of what disclosures Instruction 11(a) required.

In Shaw, the First Circuit rejected both a categorical rule that disclosures regarding intra-quarter performance are never required and a bright-line rule that such disclosures are required whenever a company perceives a possibility that its quarter results will disappoint the market. 82 F.3d 1210. Rather, the court stated that if

> the issuer is in possession of nonpublic information indicating that the quarter in progress at the time of the public offering will be an extreme departure from the range of results which could be anticipated based on currently available information, it is consistent with the basic statutory policies favoring disclosure to require inclusion of that information in the registration statement.

Id. I find that plaintiffs here have failed to allege that SeaChange was in possession of such information. Plaintiffs have alleged a number of underlying facts which not only do not by themselves constitute viable claims but also fail to support the overall allegation that SeaChange knew it would not meet VOD revenue expectations.

In another setting, the timing of the Offering might lend support to plaintiffs' allegations of securities fraud. The Shaw court stated with reference to the 9(b) standard that:

> in testing the allegations of the complaint against Rule 9(b), we need not turn a blind eye to the obvious: the proximity of the date of the allegedly fraudulent statements and omissions to both the end of the quarter then in progress and the date on which disclosure was eventually made. While the short time frame between an allegedly fraudulent statement or omission and a later disclosure of inconsistent information does not, standing alone, provide a sufficient factual grounding to satisfy Rule 9(b), see Arazie, 2 F.3d at 1467-68, there is nothing in Rule 9(b) that precludes consideration of such temporal proximity as a circumstance potentially bolstering the complaint's claims

of fraud.

Shaw, 82 F.3d at 1224-25. Cf. Glassman v. Computervision Corp., 90 F.3d 617, 632 (1st Cir. 1996) (dismissing claim where allegedly disclosed information was only seven weeks into the quarter). But here the overall results exceeded prior projections by the defendants. The defendants did not make such projections as to the VOD revenue contribution to the overall results in the fourth quarter sufficient to ground a misrepresentation on a shortfall in that sector. There is no meaningful basis to conclude that the shortfall had a materially disproportionate impact on consolidated financials or that a failure to provide discussion by segment was either incomplete or misleading. In short, the plaintiffs have not sufficiently alleged a specific factual foundation that grounds a duty of disclosure as to the VOD revenue claims. Rather, they offer only the inference arising out of the timing of the Offering, and such allegations of "fraud by hindsight" are not sufficient to stake a claim for securities fraud. See Shaw, 82 F.3d at 1223.

(d) Price Erosion - Plaintiffs allege that SeaChange had a duty to disclose information concerning the fact that the "price of SeaChange's VOD equipment was declining faster than had been expected." Complaint at § 62. Plaintiffs, however, allege no factual support for these allegations. Plaintiffs offer only a report by an analyst at Thomas Weisel, which stated: "Our main concern going forward is price erosion in the VOD market." Id. ¶ 45. The report, however, was issued on March 6, 2002, after the

Offering, and plaintiffs merely state, in conclusory fashion, that the report was "based largely on pricing trends already existing at the time of [the Offering]." Id. ¶ 46. Plaintiffs allege no facts to support their contention that VOD prices were in fact eroding at the time of the Offering, but more importantly, they allege no basis for their claim that SeaChange was aware of the trend at the time of the Offering such that it should have disclosed it in the Prospectus. A company is required only to disclose a known trend that it "reasonably expects will have a material favorable or unfavorable impact on net sales or revenues or income from continuing operations." 17 CFR § 229.303(a)(3). Plaintiffs have not pled sufficient facts to support its claim that the alleged price erosion was such a trend. Therefore I dismiss plaintiffs' claims related to allege price erosion.

B. § 15

Section 15 of the 1933 Securities Act states:

> Every person who, by or through stock ownership, agency, or otherwise, or who, pursuant to or in connection with an agreement or understanding with one or more other persons by or through stock ownership, agency, or otherwise, controls any person liable under sections 77k or 77l of this title, shall also be liable jointly and severally with and to the same extent as such controlled person to any person to whom such controlled person is liable, unless the controlling person had no knowledge of or reasonable ground to believe in the existence of the facts by reason of which the liability of the controlled person is alleged to exist.

15 U.S.C. § 77o.

To state a claim for controlling person liability, plaintiffs must adequately allege: (1) an underlying primary violation; and (2) the individual defendant had control over the primary violator, namely SeaChange. Aldridge v. A.T. Cross Corp., 284 F.3d 72, 85 (1st Cir. 2002). As discussed above, plaintiffs have failed sufficiently to allege a primary violation under § 11 or § 12. Accordingly, plaintiffs' § 15 claims will be dismissed.

III. CONCLUSION

For the reasons set forth more fully above, defendants' motions to dismiss under Fed. R. Civ. P. 12(b)(6) are GRANTED as to all claims.

/s/ Douglas P. Woodlock

DOUGLAS P. WOODLOCK
UNITED STATES DISTRICT JUDGE